

equipment ordinarily constitute construction work. In such cases the cost of installation ordinarily is substantial in relation to the cost of the goods installed.

(f) *Quantity sales to farmers.* It should be noted that the concept of fleet sales discussed in paragraphs (c)(3) and (5) of this section is not applied to sales to farmers, even though the farmer uses five or more vehicles on his farm.

(g) *Particular activities which lack a retail concept.* Any receipts derived from warehousing, construction, including water well drilling, or manufacturing activities performed by the automobile, truck, or farm implement dealer are not receipts from retail sales. These activities and the manufacturing of farm implements are not retail activities.

§ 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, trailers, farm implements, or aircraft. Section 13(b)(10) states that the provisions of section 7 shall not apply with respect to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.” This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling automobiles, trailers, trucks, farm implements, or aircraft to the ultimate purchaser. If these tests are met by an establishment the exemption will be available for salesmen, partsmen, and

mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. An explanation of the term “employed by” is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership (H. Rept. No. 1366, 89th Cong., second session, page 42; Sen. Rept. No. 1487, 89th Cong., second session, page 32). However, the salesman, partsman, or mechanic, to qualify for exemption, must be “primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft.” (H. Rept. No. 2004, 89th Cong., second session, pp. 7, 19.)

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships which qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in aircraft and trailers.

(c) “*Salesman, partsman, or mechanic.*”

(1) As used in section 13(b)(10), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee’s own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive,

truck, farm implement, or aircraft mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such. This includes mechanical work required for safe operation, as a vehicle, farm implement, or aircraft. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who performs nonmechanical repair work is not exempt. When employed by an establishment qualifying under section 13(b)(10) which sells and services trailers, mechanics primarily engaged in servicing the trailers for their use and operation as such may qualify for the exemption. "Trailers" include a wide variety of non-powered vehicles used for industrial, commercial, or personal transport or travel on the highways by attaching the vehicle to the rear of a separate powered vehicle. Mechanics servicing mobile homes for operation and use as a trailer, if and to the extent that they are operated as such on their own suspension systems would appear to be performing work within the purview of the exemption provided for mechanics in section 13(b)(10) to the same extent as mechanics servicing automobiles, ordinary travel, boat, or camping trailers, trucks, and truck or tractor trailers. On the other hand, there is no indication in the statutory language or the legislative history of any intent to provide exemption for mechanics whose work is directed to the habitability as a residence of a dwelling to be used as such on a fixed site in a particular locality, merely because the home is so designed that it may be moved to another location over the highways more readily than the traditional types of residential structures. Accordingly, servicemen checking, servicing, or re-

pairing the plumbing, electrical, heating, air conditioning, or butane gas systems, the doors, windows, and other structural features of mobile homes to make them habitable or more habitable as residences are, while so engaged, not deemed to qualify as "mechanic(s) * * * servicing * * * trailers" within the meaning of section 13(b)(10). (*Snell v. Quality Mobile Home Brokers*, 424 F. 2d 233 (C.A. 4); *Schultz v. Louisiana Trailer Sales, Inc.* 428 F. 2d 61 (C.A. 5) certiorari denied, 400 U.S. 902.)

(4) Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishments annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

[35 FR 5856, Apr. 9, 1970, as amended at 38 FR 7549, Mar. 23, 1973]

OTHER ESTABLISHMENTS FOR WHICH SPECIAL EXCEPTIONS OR EXEMPTIONS ARE PROVIDED

§ 779.381 Establishments within special exceptions or exemptions.

(a) As stated in § 779.338, the special exceptions provided in the 1961 amendments for hotels, motels, restaurants, hospitals, institutions for the sick, the aged, the mentally ill or defective, and schools for physically or mentally handicapped or gifted children have been removed. Seasonally operated amusement or recreational establishments and motion picture theaters also no longer are specifically exempt under